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CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ARTHUR GOLD and LORENE KIEL,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

No. 635

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, AND BRIEF IN SUPPORT THEREOF

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* * * * *

Note: The Brief in support of the Petition is set out following the Petition, and is numbered starting with the number one (1), and is preceded by an index.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ARTHUR ⌀ELD and LORINE KINZ,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
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No._____

PETITION FOR A ⌀RIT OF CERTIORARI

TO THE SUP⌀RIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, ARTHUR ⌀ELD and LORINE KINZ, respectfully allege:

A.

Summary Statement of the Matter Involved

Petitioners were convicted in the Police Court of

the City of Oakland, County of Alameda, State of California of violating a Municipal Ordinance of the said city, Section 3-6.01 of the Oakland Municipal Code, which provides as follows:

> "Whenever the free passage of any street or sidewalk shall be obstructed by a crowd, except on the occasion of public meetings, the persons composing such crowd shall disperse or move on when directed to do so by a police officer. It shall be unlawful for any person to refuse to so disperse or move on when so directed to do by a police officer as herein provided."

(The said ordinance may be found in the official edition collecting City of Oakland Municipal ordinances, at page 72.)

Petitioners were each sentenced to pay a fine of $100.00 or serve twenty-five days in the Oakland City Prison. (R. p.21) They took an appeal to the Superior Court of the State of California in and for the County of Alameda, which court affirmed the judgments of conviction on September 19, 1940. (R.p.39) They are now on bail.

Petitioners at the outset and throughout these proceedings challenged the validity of the ordinance set out above both upon its face and as applied and enforced in their case as being violative of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. (See Brief, infra, p.2-5, for abstract of case.)

B.

JURISDICTION
(Pursuant to Rules 38(2) and 12(1))

1. Statutory Provision.

This Court's jurisdiction rests on Section 237(b)

of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A.Sec. 344.)

2. State Statute Validity of which Involved-

(See supra, p. 2.)

3. Finality of Judgment-

The judgment below became final on September 19, 1940.

4. Petition Timely Filed-

This petition is filed within the time provided by R.S. 1008, (28 U.S.C.A. Sec. 350), being presented before December 19, 1940.

5.. Judgment of Highest State Court-

The Superior Court of the State of California in and for the County of Alameda is the court of last resort in the state insofar as a case originating in the Police Court of the City of Oakland like the instant case is concerned; the various county superior courts being courts of last resort under the law of California in cases originating in Justice, police or municipal courts within such counties.

McLean v. Freiberger, 215 Cal. 1

Carlson v. California, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 668

6. Cases sustaining Jurisdiction-

The following cases are believed to sustain the jurisdiction of this court in the instant case.

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 118

Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 669

Carlson v. California, supra

Fiske v. Kansas, 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108

Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888

7. Federal Questions Raised.

In the court of first instance (Police Court of City of Oakland) the said ordinance was challenged by petitioners as being repugnant to the due process of law clause of the Fourteenth Amendment by demurrer, and by motions to dismiss. (R. p. 3-9) The demurrers were overruled, and the motions to dismiss were denied. (R. p. 22)

Thereafter, in the same court, upon completion of the People's case, petitioners moved the court for advised verdicts of acquittal upon the grounds that the People had proved the petitioners were engaged in peaceful picketing, carrying banners, and distributing leaflets, all in a peaceful, lawful, and orderly fashion; that the people had failed to prove the petitioners had committed the offense contemplated by the ordinance; that any obstruction of the sidewalk was purely incidental to the exercise by petitioners of guaranteed constitutional rights; that to permit the case to go to the jury or to allow the conviction of the petitioners upon the evidence presented by the People themselves would constitute such an application and enforcement of said ordinance against

petitioners that they would be deprived of liberty of speech and press without due process of law within the meaning of the Fourteenth Amendment. (R. p.32) The court denied the motions. (R. p.32)

Petitioners put in their defense. The cause was argued, the jury charged, and submitted. The jury found the defendants guilty as charged. (R. p.11-12)

Petitioners made motions in arrest of judgment and for a new trial upon the same grounds as those urged in support of the motions for an advised verdict of acquittal. (R. p.13-15 The motions were denied by the trial court (R. p.21) which thereupon proceeded to pronounce the sentences set out above.

Petitioners took an appeal to the Superior Court of the State of California in and for the County of Alameda from the final verdicts and ~~sentences~~ judgments of conviction, and from the orders denying motions for a new trial and in arrest of judgment.

By written brief and oral argument upon the taking of said appeal and at the outset thereof the same points as those set out above were urged upon the appellate court as necessitating a reversal. (R. p.22-26) The judgment of conviction and the orders denying the motions in arrest of judgment and for a new trial were affirmed by said court. (R. p.39) It is to this judgment wherein the federal questions set out above were finally resolved in the state court of last resort that this petition is addressed.

B. Questions Involved are Substantial-

See infra, pp. 8-11.

C.

QUESTIONS PRESENTED

Four questions are presented:

1. Does Ordinance 3-8.01, upon its face, abridge and deny that liberty of speech, press and assemblage, and deprive of property without due process of law in violation of the Fourteenth Amendment?

2. Is Ordinance 3-8.01 repugnant to the due process of law clause of the Fourteenth Amendment in that it is altogether vague and indefinite and provides no reasonably ascertainable standard of guilt?

3. Was Ordinance 3-8.01 so applied and enforced in the instant case that it abridged and denied petitioners' liberty of speech, press and assemblage and deprived them of property without due process of law in violation of the Fourteenth Amendment, and in such a way as to circumvent decisions of this Court? (Schneider v. State, supra; Carlson v. California, supra; Thornhill v. Alabama, supra)

4. Was Ordinance 3-8.01 so applied and enforced in the instant case, in the refusal of the trial court to give the following instructions and the appellate court's ruling that such refusal was not error, that petitioners were denied liberty of speech, press and assemblage, and deprived of property without due process of law in violation of the

Fourteenth Amendment?

Defendants' Proposed Instruction No. 1

The right of peaceful picketing is guaranteed and protected by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 2

If you find from the evidence that the defendants were engaged in peaceful picketing it is your duty to find them not guilty.

Defendants' Proposed Instruction No. 3

If you find from the evidence that the defendants were engaged in peaceful picketing and that pedestrians were able to pass along the sidewalk where the picket line was maintained and were not molested nor prevented from passing by the picket line, you should find the defendants not guilty.

Defendants' Proposed Instruction No. 6

You are advised that the right to freely assemble on the street for the purpose of meeting and discussing public questions is guaranteed to all by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 7

If you find from the evidence that the defendants met in the street for the purpose of publicizing and discussing a public question you are instructed that these acts are not subject to punishment.

Defendants' Proposed Instruction No. 8

You are advised that before you can find the defendants guilty in this case you must be convinced beyond a reasonable doubt that they wilfully and intentionally obstructed the sidewalk in front of Romley's Market, and so as to prevent and for the purpose of preventing passers-by from passing along the said sidewalk.

D.

Reasons Relied on for the Allowance of the Writ

1. The courts below have held valid Ordinance 3-6.01 as a valid exercise by a municipality of its police power in connection with regulating the use of sidewalks and streets, despite the fact that said ordinance, on its face, abridges and denies liberty of speech, press and assemblage, and deprives of property without due process of law in violation of the Fourteenth Amendment, and the courts below have thereby ignored and refused to follow the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra; Thornhill v. Alabama, supra.

Insofar as counsel know and are advised, this Court has not yet passed on the question of whether a local "Move-on" ordinance similar to the ordinance here involved violates the due process clause of the Fourteenth Amendment. A federal question of first instance is thereby presented to this Court.

2. The courts below have held valid Ordinance 3-6.01 as being a proper and valid penal statute, although

said statute is altogether vague and indefinite, sets up no reasonably ascertainable standard of guilt, and is so broad, general and all-inclusive in its terms and language, that it makes peaceful and lawful acts and constitutionally protected activity, criminal. Said statute plainly violates the due process of law clause of the Fourteenth Amendment, and the courts below, in failing to so hold, have ignored and refused to follow the decisions of this Court, to-wit:

Lanzetta v. New Jersey, supra;

Carlson v. California, supra;

Thornhill v. Alabama, supra

3. The evidence in this case plainly shows that petitioners were engaged in peaceful picketing, carrying banners and distributing leaflets, and thereby exercising that liberty of speech, press and assemblage protected by the due process of law clause of the Fourteenth Amendment. Nevertheless, petitioners were arrested, charged, convicted and their convictions affirmed, of violating a "Move-on" ordinance. The evidence shows that any obstruction of the sidewalk or street, which may have occurred, was purely incidental to the exercise by petitioners of their constitutional rights, and that there is no evidence showing these petitioners to have blocked or obstructed the passage of any person. The conviction of petitioners, and the affirmance of those convictions, constitute an application and enforcement against them of Ordinance 3-6.01, in an unconstitutional manner, and in such a way as to deprive

them of their constitutional liberties of freedom of speech, press and assemblage, without due process of law.

The courts below, by such action, circumvented the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra; Thornhill v. Alabama, supra. If a municipality, supported by local courts, can enforce and apply a "Move-on" ordinance in the manner done in this case, without restraint, then the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra, become meaningless. While abstractly recognizing the constitutional right to peacefully picket, distribute leaflets, carry banners, and peaceably to assemble, the municipality supported by local courts will simply turn to such a "Move-on" ordinance as was employed in this case to prohibit by indirection what they cannot directly prohibit.

It seems clear to us that this Court must strike down such misapplication and enforcement of local "Move-on" laws under circumstances revealed in this case, if the decisions in Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra, are to have continued meaning and force.

The courts below have ignored the decisions of this Court that while a statute may be valid, it nevertheless cannot be enforced or applied to deny and take away liberty of speech, press and assemblage, to-wit:

Fiske v. Kansas, supra;

De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278.

4. In refusing to give the instructions noted above, supra, pp. 7-8, the courts below refused to permit the jury to find that if petitioners were engaged in the exercise of constitutionally protected rights, viz: peaceful picketing, distributing leaflets, carrying banners, peaceably assembling, they could not be guilty of violating Ordinance 3-6.01. The trial court, by refusing to grant these instructions, and thereby not permitting the jury to pass on this question and the Superior Court in holding there was no error in the refusal to grant these instructions, made an unconstitutional application and enforcement of Ordinance 3-6.01.

In other words, the courts below refused to instruct the jury that constitutional rights were paramount, and that any incidental obstruction of the sidewalk would not constitute a violation of Ordinance 3-6.01. So long as defendants were engaged in the peaceful and lawful exercise of their constitutional rights of speech, press and assemblage, they could not be guilty of violating Ordinance 3-6.01, and the courts below in failing to so instruct the jury, although requested so to do by petitioners, ignored and refused to follow the decisions of this Court in Fiske v. Kansas, supra; De Jonge v. Oregon, supra; Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra.

WHEREFORE, your petitioners pray that this Hon-

orable Court will be pleased to issue its Writ of Certiorari to the Superior Court of the State of California, in and for the County of Alameda, commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said court "No. 16412, THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. ARTHUR FELD and LORINE KINZ, Defendants and Appellants," to the end that said case may be reviewed and determined by this Court as provided by law, and that said judgment of said Superior Court of the State of California, in and for the County of Alameda, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just.

DATED: San Francisco, California
December 16th, 1940

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